No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE POTTSVILLE BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The first opinion of the United States Court of Appeals for the District of Columbia (R. 24–29) is reported in 105 F. (2d) 36; the opinion on petitions for rehearing (R. 33) is not yet reported.

JURISDICTION

The decision of the United States Court of Appeals was entered on April 3, 1939 (R. 24), its decision on petitions for rehearing on May 5, 1939 (R. 33), and its decree on May 15, 1939 (R. 37). The petition for a writ of certiorari was filed on August 5, 1939, and granted on October 9, 1939. The jurisdiction of this Court rests

on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Commission denied respondent's application for a construction permit for a radio broadcast station on the primary ground that it was not financially responsible and on the secondary ground that its chief stockholder was not a local resident. The court below reversed on the primary ground and remanded in order that the Commission might independently consider the secondary ground. The Commission then set the application for oral argument, together with two other conflicting applications, which had been filed and heard before an examiner after the respondent's application. The question is whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider respondent's application on the original record and without regard to the subsequent applications.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, are printed in the Appendix, *infra*, pp. 59–67.

STATEMENT

In May 1936 the respondent filed an application for a construction permit to erect a new radiobroadcast station at Pottsville, Pennsylvania, to broadcast on the frequency of 580 kilocycles, with 250 watts power, daytime only (R. 5, 14). The Commission on July 2, 1936, having examined this application and being unable to

determine that public interest, convenience, or necessity would be served by granting it, designated it for hearing and gave notice to respondent; on August 12, 1936, the hearing date was fixed as September 30, 1936, when it was held (R. 13, 14). On August 10, 1936, the Schuylkill Broadcasting Company filed an application for a construction permit to operate in Pottsville on the same frequency as respondent (R. 13). On September 3, 1936, a request to designate the Schuylkill Broadcasting Company's application for hearing on the same day as the application of the Pottsville Broadcasting Company was filed by the Schuylkill Company and consented to by the Pottsville Broadcasting Company (R. 13–14). This petition was denied by the Commission (R. 14), but the Commission on September 8, 1936, permitted the Schuylkill Company to intervene in the hearing held on September 30, 1936, on the application of the Pottsville Broadcasting Company (R. 13). On November 5, 1936, an examiner of the Commission submitted his report, recommending that the application of the Pottsville Broadcasting Company be granted (R. 1, 15). Exceptions were filed and oral argument before the Commission requested by the Schuylkill Company on November 20, 1936. On December 1, 1936, the Commission granted the request for argument and argument was heard on January 28, 1937. On May 4, 1937, the Commission denied the application of the Pottsville Broadcasting Company, effective July 6, 1937 (R. 15).

On December 7, 1936, the Pottsville News and Radio Corporation filed an application for a construction per-

mit also requesting the same frequency in Pottsville (R. 20). On April 12, 1937, the applications of the Schuylkill Broadcasting Company and the Pottsville News and Radio Corporation were heard in a consolidated hearing (R. 15, 20). The Commission permitted respondent to appear and participate in the consolidated hearing on these applications (R. 15). On June 24. 1937, the Commission's examiner submitted his report, No. I-442, recommending that the application of the Schuylkill Company be granted for a construction permit to operate a daytime radio station at Pottsville, on the frequency 580 kilocycles, 250 watts power (R. 16).

On July 26, 1937, Pottsville Broadcasting Company filed an appeal in the court below under Section 402 (b) (1) from the order of the Commission denying its application (R. 15). Oral argument before the Commission on the Schuylkill application was indefinitely continued by the Commission, pending decision by the court below on the appeal of the Pottsville Broadcasting Company (R. 16). On May 9, 1938, the court below decided this appeal in favor of respondent (*Pottsville Broadcasting Company* v. *Federal Communications Commission*, 98 F. (2d) 288) (R. 1), on the ground that the Commission's finding that respondent was not financially qualified because subscriptions to its stock were not binding without the approval of the Pennsylvania Securities Commission was based upon an erroneous interpretation of Pennsylvania law.[1] The court below

[1] It may be noted that the error arose from the evidence given by the chief officer of the Pottsville Broadcasting Company (R. 3).

stated that it was unable to determine whether the Commission's further objection to the granting of the application, on the ground that the respondent's principal stockholder was not a local resident and not acquainted with the needs of the area proposed to be served, would have been controlling in the absence of the erroneous conclusion as to the financial responsibility of the Company (R. 1–4).

The Pottsville Broadcasting Company on May 23, 1938, requested the Commission to grant its application forthwith (R. 16). On June 9, 1938, the Commission took the following action: (1) It denied without prejudice the respondent's petition for immediate grant of its application; (2) it granted a petition of Pottsville News and Radio Corporation for oral argument on the applications of all three of the applicants for identical permits; (3) it stated that after the argument it would consider the three applications individually on a comparative basis, although not in a consolidated proceeding, and would grant the application which in the judgment of the Commission would best serve the public interest (R. 8).

Respondent on July 2, 1938, applied to the court below for the issuance of a writ of prohibition to prevent the Commission from (a) hearing argument or reargument except upon the one question of whether its application should be denied on the ground that respondent's principal stockholder was not a local resident; (b) from considering the application of petitioner on a comparative basis with other applications subsequently filed; (c) from hearing argument upon the other applications "until such time as the Commission shall have

complied with the judgment of this Court"; (d) "from taking any other procedural steps or from exercising jurisdiction herein other than as contemplated in the judgment of this Court reversing the Commission." It also asked for a writ of mandamus commanding the Commission (a) "to render a decision in this case, within a time certain to be fixed by this Court, and in conformity with the judgment heretofore rendered by this Court"; (b) to base that decision on the one question mentioned above; and (c) "to grant the application of your petitioner on this record as submitted to and considered by this Court" (R. 11).

The court below, on April 3, 1939, rendered an opinion holding the relief prayed should be granted (R. 24). On May 5, 1939, the court in a *per curiam* opinion denied a petition for rehearing (R. 33). On May 15, 1939, the court below, in response to a motion of the Commission (R. 34), entered an order for issuance of a writ of mandamus commanding the Commission (a) to set aside the order denying the request of the Pottsville Broadcasting Company for an immediate grant of its application and designating such application for hearing on a comparative basis, and (b) to hear and reconsider the application of the Pottsville Broadcasting Company on the basis of the record as originally made (R. 37). Issuance of the writ of mandamus was stayed pending the filing of a petition for a writ of certiorari (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In holding that it could issue a writ of mandamus to control the further action of the Commission on respondent's application;

3. In holding that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications and related matters;

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In holding that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order denying without prejudice the request of the Pottsville Broadcasting Company for immediate grant of its application, and designating this and two other competing applications for argument on the same day; and

10. In commanding the Commission to hear and reconsider the application of Pottsville Broadcasting Company on the basis of the record as originally made unless prior consent of the lower court is obtained to take some other action on the application.

SUMMARY OF ARGUMENT

I

Section 319 (a) of the Communications Act requires that the Commission grant a construction permit for a radiobroadcast station if the public interest, convenience or necessity will be served; Section 307 (a) makes a similar requirement for the subsequent grant of a station license. Notice and opportunity for hearing is required if the Commission upon examination does not decide to grant the license. The Act requires that the application be granted if it meets the statutory standard, whether or not it conflicts with outstanding permits or licenses. If the subsequent station will better serve the public interest, any outstanding conflicting authorizations must be modified or not renewed. Many factors, which the Commission must consider in each case, must shape the decision whether to hear conflicting applications simultaneously or *seriatim*, with the intention in the latter case to modify action on the first application if it should subsequently be necessary.

The Commission here determined that respondent's application, after the reversal of the Commission's earlier denial, should be considered on a comparative basis with two other conflicting applications. The court below has ordered that respondent's application be considered first, on the original record, and without regard to the other applications. But, since the Commission must grant one of these subsequent applications if it should be found to be in the public interest, the only ultimate effect of the decision below is to destroy orderly procedure in the Commission.

II

A. The court below found authority for the extraordinary relief granted respondent in Section 402 (e), which provides that the Commission shall carry out the judgment of the court and declares that the court's judgment shall be final. But the "judgment" under the express provisions of Section 402 (e) can reach only to "questions of law," which do not cover the peculiarly administrative questions of the procedure of the Commission and the grant of an application. Indeed, a specific amendment of this section, when used in the Federal Radio Act of 1927, was necessary to exclude from the court below authority such as it has undertaken here to exercise. *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266; *Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

B. The decision below is as evidently in excess of the court's powers from a broader viewpoint. (1) Consideration of an application involves many difficult problems of engineering, economics, and social policy. Their solution, and the procedure by which they are to

be examined, are peculiarly administrative questions which should not—and on the record before it, cannot—be settled by the court below. (2) For the court below under the Act is authorized to exercise only judicial functions, and not to supervise the administrative action of the Commission. (3) That supervision is not necessary to enforce obedience to the judgments of the court below; its decisions reaching only to questions of law, of course, will scrupulously be followed by the Commission in subsequent proceedings.

C. The analogy drawn by the court below to its control over the action of a trial court after reversal is mistaken. (1) The Commission, exercising only administrative functions, is in a quite different position from a trial court. It does not simply decide between contesting litigants, who might appropriately be confined to the record originally made, but must affirmatively determine that the grant of an application is in the public interest; this the court below has neither authority to control nor knowledge of conflicting applications sufficient to exercise a control if given. (2) The court below, moreover, exercises an original jurisdiction under Section 402 which reaches only to the questions of law which may be brought to it by an appellant, and does not have the broad supervisory powers which it may exercise over a trial court. (3) Finally, it may be observed that the court below, in undertaking to control issues not before it on respondent's appeal, went beyond the powers it could exercise even with respect to a trial court after reversal. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 168.

D. It is immaterial that respondent's application was the first filed. (1) The licensing provisions are designed to secure the best use of the broadcasting spectrum, not to reward the victor in a race of diligence. (2) The Commission rule of precedural convenience, that subsequently filed conflicting applications will not be set for hearing on the same day as applications already set for hearing, did not mean that the Commission either should or would necessarily take final action on the first application without considering those heard at a later day.

III

A. The court below is without jurisdiction to issue the writ of mandamus. It has no common law powers of mandamus. The statute authorizes all necessary and proper writs in connection with its appellate jurisdiction, but its jurisdiction under Section 402 is original.

B. The petition for a writ of mandamus was premature and before respondent had exhausted its administrative remedies. Until the Commission completes its consideration of the three applications respondent can point to no certain or even probable injury and quite obviously has unused administrative remedies available. The writ therefore should not have issued. *Smith* v. *Cahoon*, 283 U. S. 553, 562; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–51.

C. Even if our argument should be less obviously correct than we believe, there can be no thought that the Commission was under a clear, ministerial duty to consider respondent's application to the exclusion of

the others. Under time-honored principles, mandamus will not lie.

D. Nor can the writ be issued consistent with the equitable principles which must control grant of this extraordinary relief. (1) There is no irreparable injury. (2) There is an adequate remedy by appeal from any denial of respondent's application. (3) A court of equity could not be justified in so completely ignoring the statutory mandate that the application be granted only to the one who will best serve the public interest. *United States* v. *Morgan*, 307 U. S. 183, 191, 194.

ARGUMENT

I

THE PROCEDURAL FRAMEWORK IN WHICH APPLICATIONS FOR CONSTRUCTION PERMITS AND BROADCAST LICENSES ARE CONSIDERED

The issues in this case can be formulated with precision only when they are placed in their proper setting —the procedure which the Commission must follow in considering applications for construction permits or radiobroadcast station licenses. We believe that the court below did not properly appreciate either the duties of the Commission under the Communications Act or the procedural consequences of those duties. For, when the procedural framework is understood, it seems evident that respondents have obtained the extraordinary relief of a writ of mandamus to gain simply a fugitive procedural advantage, which cannot prove of substantial value and which serves only to confuse the

orderly disposition of the proceedings before the Commission.

1. *In General.*—The Communications Act in Section 301, *infra,* makes it unlawful for any person to operate a radio station for broadcast or other purposes without a license granted by the Commission under the provisions of the Act. The procedure prescribed in Section 319, *infra,* for licensing new radio stations, with certain exceptions not material here, provides that an applicant for radio station license shall first make written application for a construction permit to construct the station and shall upon completion of construction apply for the actual license instrument; the Commission is required to grant the permit if public convenience, interest, or necessity will be served. Section 307 (a) of the Act, *infra,* similarly provides that the Commission shall grant an application for a radio station license if public interest, convenience, or necessity will be served thereby. Since an application for a construction permit, of course, looks equally to the grant of the application for a radio station license, the procedural provisions of Section 309 (a), which relate in terms to applications for station licenses, have uniformly been construed by the Commission as being applicable to applications for construction permits.

Section 309 (a), *infra,* provides in substance that the Commission shall examine applications, and, if such examination discloses that the public interest, convenience, or necessity would be served by the granting thereof, that it shall authorize the issuance of the

license. If the Commission, upon such an examination, determines that public interest, convenience, or necessity would be served by the granting of the application, it must grant the application and issue the license requested, notwithstanding that outstanding licenses may have to be modified or a renewal of license denied to a licensee operating a station.[2] In the event that the Commission, upon such an examination, does not determine that the granting of the application would serve public interest, convenience, or necessity, it is required to notify the applicant and accord the applicant an opportunity to be heard on the application.

The Act clearly contemplates and the Communications Commission as well as its predecessor, the Federal Radio Commission, has uniformly recognized that applicants for radio station licenses are not precluded from requesting a license to operate on a particular frequency, even though such an operation may require the denial of other pending applications or even modification of or the refusal to renew outstanding licenses.[3]

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[2] Section 312 (b) authorizes the Commission to modify an outstanding license if "in the judgment of the Commission such action on its own motion will promote the public interest, convenience, and necessity."

Section 307 (d) provides that in acting upon applications for renewal of station license the Commission shall "be limited to and governed by the same considerations and practice which affect the granting of original applications." *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, involved a refusal to renew an outstanding license because under the statute the Commission was required to grant a conflicting application.

[3] The recognition that a pending application may conflict with a renewal of an outstanding license is the reason for Section 1.362

When there are pending before the Commission applications for authorization to operate radio stations which cannot operate simultaneously because of interference to reception which would result from such an operation, there obviously arise questions as to the proper procedure to be followed by the Commission in acting upon the conflicting applications. It is evident that if the applications are considered and finally acted upon *seriatim* the action taken upon the first application may have to be set aside or modified because of the action required upon the applications subsequently considered. On the other hand, it is impossible to withhold action on any particular application until such time as all possible applications have been filed which may present questions of conflict. This follows from the fact that, under the Act, an application may be filed at any time for authorization to operate a station, without regard to the pendency of previously filed applications or to the existence of outstanding licenses or authorizations. The experience of the Commission has demonstrated that it is impossible to formulate any hard and fast rule for the handling of applications for

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of the Commission's Rules of Practice and Procedure which provides:

"SEC. 1.362. Filing directed by Commission.—Whenever the Commission regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified. If the licensee fails to file such application within the prescribed time, the hearing or investigation shall proceed as if such renewal application had been received."

This rule was formerly Rule 17 of the Federal Radio Commission.

conflicting facilities which will avoid, on the one hand, the possibility of having to revise action taken on a particular application because of the filing of another application, and, on the other hand, will permit the Commission to discharge its statutory obligation to make available that radio service which will serve the public convenience, interest, or necessity.

Many considerations which vary from case to case must affect the procedural question of whether to consider pending conflicting applications separately or simultaneously. Examples are: the possibility of patent defects in one application not present in other pending applications; the possibility that conflicting applications have been filed simply to delay action by the Commission on a pending application; the adequacy of the radio service then enjoyed in the area; the likelihood that an application on file but not yet examined will offer preferable service; and the amount of delay that will result from a simultaneous comparative consideration. The Commission has deemed such varying considerations to require different procedures in different cases, in order that it should "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Section 4 (j), *infra*). The one constant factor in all such cases is the requirement that the Commission must act upon every application filed, and must in its action on the application grant or deny as required by the statutory criteria, even though a grant may require modification of its action on a previously considered application. Whether it acts first upon one of several conflicting

applications is unimportant in the long run, although in a particular case it may be important, because of an existing need for service to a particular community, to act as promptly as possible to provide service to that community.

2. *The Commission's Order of June 9, 1938.*—In May, 1937, the Commission had before it respondent's application on which a hearing had been held and argument heard by the Commission. It also had pending before it applications of Schuylkill Broadcasting Company and Pottsville News and Radio Company requesting the same facilities as respondent. These latter two applications were not at that time ready for final Commission action. Since it appeared to the Commission that respondent's application should be denied, it acted at that time to deny the application and did not delay action for possible comparative consideration with the Schuylkill and Pottsville News and Radio applications. Obviously, in the view the Commission took of respondent's application, needless delay in denying the application would not have been warranted. But when respondent took an appeal from the Commission's denial of its application, the Commission deferred further consideration of the other two applications, pending the outcome of the appeal. This was desirable because, if the Court found the Commission to have been wrong in denying respondent's application, a comparative consideration of its application and the other two applications might prove appropriate, as the Commission in fact later found it to be. After the court gave judgment for respondent in its appeal from the

Commission's denial of its application, the Commission ordered an argument on all three applications and announced that it would consider them at the same time on a comparative basis.

The Commission considered it to be better procedure to decide at one time the question of which, if any, of the three applications, all then being ready for final Commission action, should be granted, rather than acting upon them *seriatim*. A *seriatim* consideration of the applications did not appear advisable in view of the fact that the applications were all ready for final action and granting of any one of them before a consideration and determination on the other two might be abortive, because without consideration of all three, the question of which one would best serve public interest, convenience or necessity could not be answered. Since the three applications pending before the Commission requested the same facilities, this basic question must in fact be answered upon a comparative basis whether the three applications are considered simultaneously or *seriatim*.

3. *The Court's Order of May 15, 1939.*—The order of the court below commands the Commission to set aside its order designating the three applications for a hearing on a comparative basis, and to consider respondent's application on the record as originally made (R. 37). This means that respondent's application must be considered without regard to the application of Schuylkill and Pottsville News and Radio, and, further, that the Commission is not to consider those applications until after it has acted on respondent's applica-

tion. The court's order does not relieve the Commission of the necessity of considering at some later date the applications of Schuylkill and Pottsville News and Radio, nor does it excuse the Commission from the performance of its statutory duty with respect to the two other applications, even though that duty would require that one of them be granted. Should the three applications be handled as directed by the court below, and should the Commission (shutting its eyes to the other two applications) be required under the statute to grant respondent's application for a construction permit, it might very well be required at a later date, on consideration of the other two pending applications, to grant one of them notwithstanding that such a grant would preclude respondent from ever getting a station license.

It will thus be seen that the order of the court below in no way relates to any substantive rights respondent may have in connection with its application. The court's order of May 15, in final analysis, goes solely to the question of whether the Commission should give simultaneous or *seriatim* consideration to respondent's application and the other pending applications. The court could not and did not undertake to determine that a construction permit should be issued to respondent, much less that a station license should be issued to it or that the applications of Schuylkill and Pottsville News and Radio should be denied. The only effect of the order is to require *seriatim* consideration of the applications. The Commission has determined, and common sense indicates, that the more orderly pro-

cedure would be to consider the three applications at one time, on a comparative basis. The succeeding portions of this brief will show, we believe, that the court had no power to impose a contrary procedural requirement upon the Commission.

II

THE COURT BELOW HAS NO AUTHORITY TO DIRECT THE PROCEDURE TO BE FOLLOWED BY THE COMMISSION

The court below did not undertake to prescribe any general rule that conflicting applications must always be considered *seriatim* rather than simultaneously, on a comparative basis. Its decision reaches only to cases where one of the applications has been denied by the Commission and where the denial has been reversed by the court below. In those circumstances, the court below held, "it is the duty of the Commission to comply with that order and, unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in the light of this court's opinion" (R. 29), and that the Commission's determination "should be on the record originally considered" (R. 33). It emphasized that in this case it had remanded the case for consideration of one question and one question alone, the necessity of local residence of respondent's principal stockholder. The Commission's order setting the application for hearing on a comparative basis was thus viewed as a violation of the court's judgment of reversal.

The authority so to restrict the issues and the record to be considered by the Commission in subsequent proceedings, and to control its procedure, was found by the

court below either in the terms of Section 402 of the Act, *infra,* or by analogy to the supposed control over proceedings after reversal of a trial court. We shall show (a) that Section 402 grants no such authority, (b) that its exercise is a forbidden invasion of the administrative field of action, (c) that the argument based upon the analogy to the Court's control of a trial court is faulty, and (d) that it is immaterial that respondent filed the first of the conflicting applications.

A. Section 402 (e)

In addition to the remedies existing at common law or by statute (Section 414, *infra*) for invasion of legal or equitable rights by unlawful action, Section 402 of the Communications Act of 1934, *infra,* provides special remedies. Section 402 (a) provides that the provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission by a three-judge district court are applicable in suits to enforce or set aside any order of the Commission, with the exception of certain specified orders. These excepted orders are those "granting or refusing an application for construction permit for a radio station or for a radio station license, or for renewal of an existing radio station license, or for modification of existing radio station license, or suspending a radio operator's license." Subdivisions (b) to (f) of Section 402 prescribe the manner in which a suit shall be brought in cases involving an invasion of legal or equitable rights by such orders. The court below is the only court upon which jurisdiction has been conferred by these subdivisions.

Section 402 (b) provides for an appeal to the court below by, *inter alios,* an applicant for a construction permit or for a station license whose application has been refused. Section 402 (e) provides as follows:

> At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari. * * *

The court below did not specify which provision of Section 402 (e) was understood to give it authority to direct the Commission to consider respondent's application on the same record and without comparison with other applications. However, it quoted (R. 26) the clauses (1) authorizing remand to the Commission "to carry out the judgment of the court" and (2) declaring that "the court's judgment shall be final."

Neither provision justifies the view of the court below as to the consequences of its reversal. Under each of the clauses the first inquiry must be directed to what

is "the judgment" of the court. Only if the judgment includes the subsequent procedure of the Commission in its scope can Section 402 (e) authorize control of those proceedings. It seems plain enough that Section 402 (e) does not contemplate a judgment which reaches so far. For Section 402 (e) also provides that "the review by the court shall be limited to questions of law." Under no view could the Commission's procedure in considering conflicting applications, whether *seriatim* or on a single hearing, be said to constitute a "question of law" decided by the court below on respondent's appeal. Its authority under Section 402 (e) is limited by Section 402 (b) to the refusal of an application for a construction permit or station license (or for its renewal or modification). The procedure by which the application will be considered is, subject to statutory limits, committed by Sections 4 (f) and 309 (a) to the control of the Commission alone.

If, as respondent has urged (see R. 32), the court below has in effect determined that the Commission must grant respondent's application (if it determines that local residence of the chief stockholder is not necessary), the case becomes even clearer. The grant of a construction permit must be done by the Commission, not by the judgment of the court below. Whether issuance of the construction permit, or of the subsequent station license, will serve the public interest, convenience or necessity involves many considerations, only one of which presented the "question of law" decided by the court below. Specifically, the Commission must consider the legal and technical qualifications of

the applicant, the need for the station, the electrical interference with other stations, the type of radio service contemplated by the applicant, the comparative desirability as between conflicting applications, the financial responsibility of the applicant, the adequacy of the proposed engineering equipment, and the like. These questions were in no way involved in or determined by the decision of the court below. In this case, it is true, the Commission determined that there was need for a station and that the proposed engineering equipment was adequate (R. 2, 27), and erroneously determined that respondent was not financially responsible. But even if these factors, not necessary to the decision of the Commission, were not to be reexamined,[4] there yet remains the question of the comparative desirability of respondent's proposed radio service. Determination of this issue is not the "question of law" which was decided below; the judgment of the court which is final and is to be carried out by the Commission cannot include matters which were not before the court and which it, therefore, could not and did not decide.

It seems plain, then, that Section 402 does not authorize the court below to exercise a general control over the proceedings of the Commission subsequent to a reversal by that court. If there could be doubt, it would be removed by the exceptionally clear history of Section 402. The predecessor of that section is Section 16 of the Radio Act of 1927, *infra*, which provided that

[4] There is no need to consider whether these points could be reexamined if it appeared necessary for the Commission to do so; for the action taken by the Commission on June 9, 1938, indicated no intention on the part of the Commission to do so.

the court below might "alter or revise the decision appealed from and enter such judgment as to it may seem just." In *Radio Commission* v. *General Electric Co.*, 281 U. S. 464, the Court held that it had no jurisdiction to review a judgment of the court below directing the Commission to renew a license upon the terms found in the expiring license. The Court held that Section 16 "does no more than make that court a superior and revising agency in the same field" (p. 467). It resulted that the decision of the court below was not a judicial decision and could not be reviewed upon writ of certiorari.

The paragraph in Section 16 was thereupon amended,[5] to a form identical to the present Section 402 (e) of the Communications Act. In *Radio Commission* v. *Nelson Brothers*, 289 U. S. 266, the Court held that the amended Act contemplated a judicial judgment by the Court of Appeals, so that this Court had jurisdiction to review. The limitations upon the power of the court below which are found in the amended section, this Court said (p. 276), are "in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review."

The court below has partially recognized the statutory mandate that it confine its action to the judicial

[5] C. 788, 46 Stat. 844. The Committee Reports simply confirm the obvious purposes of the bill. See H. Rpt. No. 1665, Sen. Rpt. No. 1105, 71st Cong., 2d Sess.

function of deciding questions of law. If there has been no appeal to the court under Section 402, it will not undertake to dictate the procedure to be followed by the Commission or to prescribe the record upon which it must consider applications. *Black River Valley Broadcasts, Inc.* v. *McNinch,* 101 F. (2d) 235; 69 App. D. C. 311, certiorari denied, 307 U. S. 623. But it is evidently of the opinion that Section 402, to ensure obedience to its decisions, gives it power to exercise this supervision in cases where it has reversed the Commission's decision upon a question of law. But this possibility, too, has already been foreclosed by this Court. In considering the scope of Section 16, the same as Section 402 in this respect, the opinion in *Radio Commission* v. *Nelson Brothers, supra,* 278, unequivocally states:

> The provision that, in case the Court reverses the decision of the Commission, "it shall remand the case to the Commission to carry out the judgment of the Court" means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. * * *

There is no suggestion that the Commission in this case proposed to depart from the ruling of the court below as to the Commission's reason for disputing the financial responsibility of respondent. It merely set the application for the "further action" approved by this Court, in which it cannot be thought that the Commission will not scrupulously "respect and follow the Court's determination of the questions of law."

It thus seems plain enough that Section 402 (e) gives the court below no general authority, simply because

it has reversed the Commission upon a question of law, to control the subsequent proceedings in the Commission. Further proof, if it be needed, is found in *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364. There the Court affirmed a decision granting the petition of the Board for a remand before argument in order that it might correct possible procedural defects. The provisions governing review are, broadly speaking, similar in the Communications and the National Labor Relations Acts. The *Ford* decision, while distinguishable in that the Board itself moved for remand before argument, was reached because a similar course would be followed if the court itself were to reverse and remand the cause. The Court said (p. 374):

> The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Comm'n.* v. *Nelson Brothers Co.,* 289 U. S. 266, 278.
>
> Such a remand does not dismiss or terminate the administrative proceeding. * * *

Indeed, no other rule would be possible under long settled principles governing the permissible scope of judicial review of administrative agencies. The reversal by the court is restricted to the questions of law which it was authorized to decide; in subsequent proceedings the administrative agency is not, because it erred in the decision of one question of law, foreclosed from exercising its statutory powers and duties in the decision of other questions of law and fact. See

Southern Ry Co. v. *St. Louis Hay Co.*, 214 U. S. 297, 302; *Florida* v. *United States*, 282 U. S. 194, 215; 292 U. S. 1; *United States* v. *Morgan*, 307 U. S. 183; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47, 48–49 (C. C. A. 6th), certiorari denied, 273 U. S. 717; *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, 42 (C. C. A. 6th); *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.).

B. The Decision Below Invades the Administrative Field

Section 402, we have shown, not only fails to supply authority for the writ of mandamus issued below, but it contains an affirmative prohibition against exercise of a power which goes so far beyond the questions of law which alone may be decided by the court. The same result is compelled if one approaches the issue along a broader front. Basic considerations of the division of governmental powers between administrative agencies and reviewing courts point equally to the necessity that the Commission be free to perform its administrative duties after as well as before it has been reversed on a question of law by the court below. At the cost of some duplication of the discussion of Section 402, it seems worthwhile to explore the more general implications of the decision of the court below.

1. *Consideration of an Application is an Administrative Function.*—It is unnecessary to expand the self-evident proposition that the Commission, in considering an application for a construction permit or a station license, is performing a peculiarly administrative func-

tion. *Radio Commission* v. *General Electric Co.*, 281 U. S. 464. As this Court declared in *Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 276:

> Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. * * *

Nor can it be necessary to elaborate the motives which led Congress to commit decision of these questions to an expert body "for the use of that enlightened judgment which the Commission by training and experience is qualified to form" (*Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286). The consideration of an application for a construction permit or station license often involves decision upon uncommonly complicated and diverse problems. The judgment of engineers is required to determine the adequacy of equipment and the interference which the proposed station may present with respect to the broadcasts of other stations. The judgment of accountants and financial experts is needed to ensure that a portion of the radio broadcast spectrum is not being appropriated by an applicant who is financially irresponsible or whose probable revenues are so insufficient that the venture cannot be sanctioned. Wisdom and restraint, born of experience, should combine to assure the people of the best available radio service and yet not stifle freedom of expression. While no body of men can be expected

always to decide these questions wisely, the nature of the radio broadcast field is such that the questions must in every case be answered; there must be choice among competing applicants for a given frequency, and there must be a limitation upon the scope of the operations of those licensed.

Congress created first the Federal Radio Commission and then the Federal Communications Commission to exercise the discriminating selection and regulation which is required if the broadcasting industry were not to be reduced to a self-defeating anarchy. Its decisions, by their very nature, require the expert judgment of administrative officers, who must fill out the statutory framework and extend the broad legislative direction to countless specific cases.

Under the decision of the court below, the Commission is forbidden to exercise the administrative duties which have been conferred on it by Congress. We have shown (*supra,* pp. 12–20) that in the final analysis the only practical effect of the decision is to require the Commission to consider the three applications *seriatim,* rather than together, because even if respondent's application for a construction permit were granted the Commission under the Act could not refuse a better qualified applicant simply because this would require refusal of respondent's station license. But even in this light there has been imposed on the Commission an extensive control of its purely administrative functions, both as to its procedure and as to its substantive consideration of respondent's application.

We have shown (*supra*, pp. 16–17) that many factors must influence the Commission's decision whether to hear conflicting applications *seriatim* or simultaneously. Few, if any, of these factors could have been known to the court below from the record presented to it on respondent's appeal; none could have afforded it a legitimate occasion, in disposing of that appeal, to undertake to prescribe the procedural details by which the Commission would accomplish its statutory duty to dispose of all three of the applications.

There would be no contention that respondent, or any of the other applicants, could appeal from the order setting the applications for a single hearing on a comparative basis, for Section 402 (b) authorizes appeal only from a refusal of the application. By the same token, there could be no power in the court to accomplish the same result by writ of mandamus. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

If the purpose of the writ was, as respondent seems to believe, less to control the procedural details of the Commission's action than to ensure that the respondent be granted a construction permit to the exclusion of the other applicants,* the administrative nature of the functions thus controlled is even clearer. The Commission and not the court is to determine which of conflicting applications will best serve the public interest (*Radio Commission* v. *Nelson Brothers Co., supra*); even if the necessary information as to the other appli-

* Subject, of course, to the Commission's decision as to the effect of the nonresidence of respondent's chief stockholder, which was expressly left open by the opinion of the court below on the appeal (R. 4).

cations had been before the court below, resolution of the difficult engineering, economic, social, and other problems which must be faced before choice is made is exclusively an administrative function.

2. *The Act Commits Only Judicial Functions to the Court Below.*—The process of granting applications for construction permits and station licenses is, then, a purely administrative function. But acts done in the performance of this administrative process may result in controversies appropriate for judicial decision. Such controversies may involve questions arising in response to contentions: (a) that the Commission has misinterpreted the statutory definition of its duties or the limits of its authority; (b) that it has erroneously decided a question of general law; (c) that its procedure did not satisfy the requirements of the statute or of due process; or (d) that the Commission has found facts without any substantial supporting evidence. See *Radio Commission* v. *Nelson Brothers Co., supra,* 276–277. These, and these alone, are judicial questions.

After the amendment to Section 16 of the Federal Radio Act, the court below was authorized on appeal under that section, or under Section 402 of the Communications Act, to decide only judicial questions (see *supra,* p. 25). It is, therefore, unnecessary to explore the interesting question of whether the court could constitutionally be authorized to do more.[1]

[1] The courts of the District of Columbia, after the decision in *O'Donoghue* v. *United States,* 289 U. S. 516, must be taken to serve as Article III courts as well as courts created for the government of the District of Columbia. The constitutional objec-

Since the effect of the writ of mandamus issued by the court below is to direct the manner of performance of administrative functions, and since it has jurisdiction only to perform the judicial function of deciding questions of law, its judgment seems of necessity to be wrong.

3. *The Effect of the Appeal Under Section 402.*—We do not understand the court below to have controverted these basic principles. It issued the writ of mandamus not on the ground that it had an independent power to control the administrative functions of the Commission but on the theory that such control as it exercised was necessary to preserve the full force of its own judgment of reversal (see R. 29). This is made clearer in the similar decision in *Carrier Post Publishing Co.* v. *Federal Communications Commission*, not yet reported,

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tion to vesting federal executive or legislative functions in a court exercising the judicial power defined by Article III rests on the doctrine of separation of powers. If *federal* executive or legislative functions were given to the District of Columbia courts, which also exercise the Article III judicial function, a commingling of executive or legislative with judicial federal governmental powers would result. The policy of the prohibition against placing any two of these functions in the same hands would cast doubt on the constitutionality of any attempt to achieve this result. There would, on the other hand, be no such objection to adding *District of Columbia* executive or legislative powers, which would involve no coalescence of federal powers into the hands of a single body. Under this view, supported more by logic than by precedent; the *O'Donoghue* case served to overrule dicta in *Postum Cereal Co.* v. *Calif. Fig Nut Co.*, 272 U. S. 693, and *Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

decided June 30, 1939,* than in the present case. In the *Courier Post* opinion, delivered *per curiam*, the court said:

> we think the Commission is wrong in joining in its order for rehearing with petitioner's application, stations which had not applied for radio licenses up to the time petitioner's case was heard by the Commission. If a different view prevails, an appeal to this court would be a futile gesture, and there would be no termination to proceedings of this character. The provisions of the Act make our decision final, and the Commission should proceed in accordance with its terms. * * * no application has been made to us to reopen the case, the Commission taking the position here, as before, that we have no right or authority to direct it in any respect as to what it shall do after our decision is rendered, except to the extent that it shall undo what we have condemned on appeal. To recognize this principle, would be to establish an arbitrary discretion on the part of the Commission which we think is not provided in or contemplated by the Act.

The court below, therefore, seems to feel that, if the Commission after a reversal were allowed to go about its statutory duties in connection with applications for construction permits or station licenses, an appeal would become "a futile gesture" and there would be established "an arbitrary discretion on the part of the

* Judgment has not yet been entered. On August 2, 1939, after various intervening motions, the court reaffirmed the decision of June 30, 1939, but allowed the Commission 15 days in which to controvert facts alleged or to make further pleadings. The Commission on August 19, 1939, filed a memorandum disclaiming desire to do either. No further order has been entered in the case.

Commission." Even if these fears had substance, they would not justify the assumption by the court below of powers not given it by Congress. But it seems plain enough that the fears are quite unjustified.

To illustrate with the case at bar, respondent's appeal to the court below was, very obviously, not a futile gesture. Its application had been denied by the Commission because of a decision that financial responsibility had not been shown. The reversal by the court below has resulted in the Commission restoring respondent's application to the docket, for consideration together with those of Schuylkill and Pottsville News and Radio. Neither the court below nor respondent has suggested that the Commission proposes to disregard the ruling of that court, and in the subsequent proceedings there will of course be no question but that consent of the Pennsylvania Commission to the security issuance will be irrelevant to respondent's financial responsibility. If respondent should be granted a permit, the appeal will have served its entire purpose.

If, on the other hand, the Commission should determine that public interest, convenience, or necessity required that the application of Schuylkill or Pottsville Radio and News should be granted, petitioner would ultimately gain nothing by its appeal. But its futility would be traced, not to the Commission procedure, but to the deficiencies, absolute or comparative, of respondent's application. The court below did not undertake to determine that respondent rather than the competing applicants was entitled to a construction permit. If the Commission, going beyond the court's decision, were to ignore the conflicting applications and to grant re-

spondent's application because the Commission had declared respondent financially irresponsible on erroneous grounds, its action might be a graceful gesture, but it hardly would be compliance with Sections 319 (a) and 309 (a) of the Communications Act. Certainly Schuylkill and Pottsville Radio and News could make a forceful case on appeal from any denial of their applications which was made necessary by a grant of respondent's application simply because of contrition for past error.

The second ground advanced in the *Courier Post* opinion was the court's belief that to sanction further proceedings, in connection with other applications, would be "to establish an arbitrary discretion on the part of the Commission." We do not see that the determination of questions not considered by the court below, and which must under the statute be determined before the license is issued, can be said to be an "arbitrary discretion." Certainly the discretion, and the possibility of its arbitrary exercise, are no less when the Commission examines the applications before there has been an appeal to the court below. Yet we are confident that the court, in making a charge of this gravity, did not mean to imply that the Commission would act in a more arbitrary manner as a result of having the benefit of the opinion of that court on one of the several questions involved.

In truth, the effect of a reversal under Section 402 can be no more than a conclusive determination of the appealed questions of law which arise in the consideration of applications for construction permits or station licenses. The court below has no authority to

supervise the administrative function; applications can be granted only on the Commission's determination and not on the judgment of the court below. Even if it had the authority, we are at a loss to see how the court below, which could not have before it the factual and administrative considerations which led the Commission to set the three applications for a joint hearing, could undertake to forbid the Commission to do so. It could not, therefore, have been passing judgment on the efficiency or the economy of that procedure. Yet it could hardly have meant that the Commission was to deny the applications of Schuylkill and Pottsville Radio and News simply because it had erroneously determined respondent not to have shown financial responsibility. Not only, then, does the decision below seem an extraordinary invasion of the administrative powers vested in the Commission, not only does it seem to fly in the face of Sections 309, 319, and 402 of the Act, but it does not seem a sensible way to accomplish any purpose which can reasonably be ascribed to the court below.

C. The Analogy to Review of a Trial Court is Mistaken

The court below, we submit, reached a conclusion which is at war with the terms of the statute, with the necessary demarcation between judicial and administrative functions, and with common sense. It was led into this error, in part at least, because of an unquestioning assumption that its powers and duties on review of a refusal by the Commission to grant a permit or license were coextensive, in nature and in scope, with its power to review the decisions of the District Court

for the District of Columbia.* This assumption: (1) ignores the differences between the functions of the Commission and those of a trial court; (2) mistakes the character of the jurisdiction and powers of the court under Section 402; and (3) even if the analogy be accepted, ascribes too narrow a field of action to the trial court itself.

1. *The Contrasting Functions of the Commission and a Trial Court.*—There is no occasion to labor the point that the Commission exercises only administrative functions, the trial court only judicial functions. It should, however, be emphasized that lying behind this terminology are many differences in function which demonstrate the impropriety of a supervision so confining as that undertaken by the court below.

We have shown (*supra*, pp 29–30) that the Commission's consideration of an application for a construction permit or a station license requires the solution of a number of engineering, economic, social, and other problems. Even if there be but a single applicant, the Commission must weigh the relevant factors and reach a decision whether the grant of the application would be in the public interest, necessity, or convenience. Its duty is not the choice between the conflicting contentions of opposed parties, but the investigation and de-

* It said (R. 27): "We have no doubt that as far as is practicable the order of the Court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding. The rule in such cases is stated in *Sanford Fork & Tool Co.*, Petitioners, 160 U. S. 247, restated *In re Potts*, 166 U. S. 263, and confirmed in *D. L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1."

termination of factors bearing upon the public interest. When conflicting applications are before the Commission, its decision may often involve the choice between opposing contentions but its basic duty remains the same: it must affirmatively conclude, before it grants an application, not alone that one applicant has made the better case, but that his application is in the public interest, convenience, or necessity.

This duty, it may be observed, does not vanish because an applicant on appeal has secured a reversal on a question of law involved in the proceeding. Then, as in the original proceeding, the Commission must obey the statutory command that the application which best serves the public interest be granted. Then, as before the appeal, the Commission cannot grant an application unless satisfied that from every viewpoint—engineering, economic and social—construction and operation of the station would serve the public interest, convenience or necessity.

There are, it is true, procedural protections for the applicants which in many instances will offer analogies to judicial procedure. If the Commission, upon examination of an application, determines that the public interest will be served by its grant, no further proceedings are necessary. But, if it does not reach such a conclusion, Section 309 (a) directs that the Commission, upon notice to the applicant, shall afford an opportunity for hearing on the question. At these hearings, of course, the applicant and interveners may appear by counsel, introduce evidence, submit proposed findings, and argue their case before the Commission.

But these procedural similarities to a judicial proceeding do not alter the quite evident facts that the Commission's function remains the discharge of administrative functions under the Act, that its role is not to decide between contesting litigants but to determine whether any given applicant meets the statutory requirements, and that its procedural framework for investigating these questions must of necessity be shaped by that function.

Thus, it may be assumed that litigants before a trial court should have but one opportunity to make their record and that a reversal for errors of law should afford no occasion for reopening the record in order that the appellee might try again. The judicial function is to determine, as expeditiously as possible, controversies between opposing parties. But this is wholly without application to the duties of the Commission under Sections 309 and 319, which are not to choose between contestants but to satisfy itself that the permit or license will serve the public interest. If a litigant errs on one question of law, there might be occasion for deciding the entire case against him, so long as it be determinative on the record before the appellate court. But, if the Commission errs on a question of law, the case cannot be decided "against" it. It is not a party contesting for property, money, or some privilege. It is an administrative body which alone can determine if an application is in the public interest. If it errs on a question of law, its conclusion on that issue can and should be corrected. But *non constat* that the court can control the Commission's decision on other factors, not

challenged as erroneous in law, the determination of which is committed by the Act to the Commission.

In this we have assumed that the court below did in truth have before it the evidence available to the Commission. But the present case is even clearer, for the court could not possibly know either the factors which led the Commission to direct a joint hearing of the conflicting applications or the terms of the competing applications. Under these circumstances, to apply the analogy of reversal of a trial court and to confine the Commission's consideration to a single application on the original record is patently unwarranted.

Indeed, if one were seeking judicial analogies, it would be easy to postulate much closer cases than those cited by the court below from which to reason. If, for one example, the court below reversed a trial court in dismissing as unfounded a claim filed in a bankruptcy proceeding, it would hardly direct that the trustee, as penalty for the error, pay in full without regard to the claims of others, nor would it deny the referee power to hear evidence on the proper amount of the claim.

2. *The Nature of the Review under Section 402.*— But even if the Commission did in fact function in a manner closely similar to that of a trial court, there would remain a further obstacle to a correspondingly minute supervision by the court below. This is the markedly different nature of the functions and powers of the court under Section 402 and those it exercises in review of a trial court.

In the first place, the "appeal" of which Section 402 speaks is not an appeal at all. It is an original pro-

ceeding, instituted by the "Appeal and Statement of the Reasons Therefor" provided by Section 402 (c). The administrative investigation by the Commission does not constitute a case or controversy; that arises for the first time when the aggrieved applicant sues the Commission in the court below. *Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 275–278; see *Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 469; cf. *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716, 722–728; *United States* v. *Ritchie*, 17 How. 525, 534; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 46–47 (C. C. A. 8th); *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752, 753 (C. C. A. 6th); *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, 618 (C. C. A. 2d), certiorari denied, 277 U. S. 598; *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2d), certiorari denied, 267 U. S. 602; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2d), certiorari denied, 278 U. S. 623.

The effect of Section 402 is to give the court below a special jurisdiction and to formalize the procedure. But the proceeding is in essence an action against the Commission, to obtain relief against arbitrary or illegal action. It is substantially the same sort of proceeding which would arise in the absence of statute, if one asserted the right to relief by injunction against an invasion of his legal or equitable rights by the Commission. As this Court said in *Radio Commission* v. *Nelson Brothers Co.*, *supra*, 277:

> If the questions of law thus presented were brought before the Court by suit to restrain the

> enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercized on an authorized appeal from the decision of an administrative body. We must not "be misled by a name, but look to the substance and intent of the proceeding."

In this proceeding, the court below is limited in its inquiry to questions of law: whether the Commission has applied an erroneous rule of law, whether its procedure is defective, and whether there is evidence to support its findings of fact. (*supra*, p. 32). It has no authority to search the record or to determine that an application should be granted; it has no power to prescribe the decision or the procedure of the Commission after its error on a question of law has been corrected.

In the case of an appeal from the District Court, however, the court below is possessed of a much broader authority. It stands, subject to familiar canons limiting the scope of review, in the place of the trial court and the single question is whether the trial court erred. Apart from the complications of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, it has full power to direct the trial court to enter the judgment and dispose of the case as the appellate court thinks right.

There is neither anomaly nor impropriety in this pervasive supervision of the action of the trial court; each court exercises a judicial function, the questions for

decision are, of course, as susceptible of correct determination by the appellate as by the trial court, and the appellate court acts on a record containing all the circumstances before the trial court. But in entertaining a proceeding under Section 402, the position of the court below is no way comparable to that when it hears an appeal from the District Court. In the exercise of its judicial function it can adjudicate only those questions of law raised in challenging the Commission's action in the performance of its executive or administrative function; it may be supposed not to have the expert assistance which must lie back of the Commission's decision on the many factors not presented to the court; and, certainly in the case where a record involving only one of conflicting applications is before it, the court has only a fragmentary part of the record which must ultimately guide the grant of one application.

We submit, therefore, that even if the writ of mandamus had been appropriate if issued to the District Court, the court below was entirely without warrant in its assumption that it possessed an analogous supervisory power over the administrative functions of the Commission.

3. *Even Were the Analogy Accurate, issuance of the Writ of Mandamus is Unwarranted.*—There remains a final comment on this basis of the decision below: even on the assumption that Section 402 gives the court an authority over the Commission which is precisely comparable to its power over a trial court, the issuance of the writ of mandamus shows a mistaken notion of the effect of a judgment of reversal. The comment is irrelevant, since the powers of the court are in

no way comparable in the two types of proceedings. But it seems worth the making, if only to point more sharply the extent of the authority which the court below has assumed to exercise over the Commission.

The appeal filed by respondent is not contained in the present record. But the Act and the decision of this Court in *Radio Commission* v. *Nelson Brothers Co., supra,* alike make plain the maximum scope of the issues before the court below. It could decide only questions of law (*supra,* p. 32). It could not determine whether the application should be granted; it could not determine which of the three pending applications would best serve the public interest; it could not determine whether the Commission should hold a joint or separate hearings; and it could not determine the type of record which the Commission should have before it in the performance of its statutory duties. These questions, peculiarly administrative in nature, could not have been before the court. Its opinion on the appeal does not profess to deal with these questions. The only two issues which it considered were the financial responsibility of the respondent and the effect of the nonresidence of its chief stockholder [10] (R. 1–4).

Accordingly, even if the Commission were subject to the same control as a trial court, settled principles of

[10] The court noted that the Commission had found need of a local station in Pottsville, and sufficient financial patronage and local talent (R. 2). It is unnecessary to consider any contention that these questions are now foreclosed to the Commission, since the Commission is not proposing to reexamine them but to inquire into the comparative value of the radio service offered by the three applicants, which has not been determined by the Commission.

appellate practice show that there can be no warrant for issuance of a writ of mandamus to forbid hearing the applications on a comparative basis. For the effect of a decision of the appellate court is simply to foreclose the issues which were before it. "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 168. See also *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256, 259; *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553–554; *Ex parte Century Co.*, 305 U. S. 354. The court below chose to rely upon dicta in the *Sanford Fork & Tool* case and the decision in *In re Potts*, 166 U. S. 263, where the mandate of the appellate court disposed of the entire case; this plainly cannot be the case here.

D. It Is Immaterial That Respondent's Application Was First Filed

The lower court seems also to have been influenced by the fact that respondent "was first in the field" by presenting its application to the Commission before the other applicants for the same facilities (R. 29). And it also emphasized the Commission Rule that conflicting applications filed after a hearing had been set would not be heard on the same day (R. 29). It based its decision upon neither consideration, but it may be well to dispose of any suggestion that either factor is relevant to the issues raised by the decision below.

1. *Priority of Application.*—Section 319 (a) very plainly requires that the Commission grant a construction permit to the best qualified applicant, not to the

first to file his application with the Commission. The licensing provisions of the Act are designed to secure the best use of the limited broadcasting facilities which are available and not to reward the victor in a race of diligence. It is significant that this Court in *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, affirmed a decision of the Radio Commission which terminated the license of a station already in existence and rendering satisfactory service in order to permit another station to render a service which the Commission found would better serve the public interest, convenience, and necessity.

Indeed, the court below, prior to its action in the present case, has recognized that controversies between applicants should not be decided "on the mere question of priority of application," but rather "on the basic standard which Congress has directed shall apply, namely, the public interest, convenience, and necessity." *Symons Broadcasting Co.* v. *Federal Radio Commission*, 64 F. (2d) 381, 62 App. D. C. 46.

2. *The Commission Rule.*—The Commission Rules of Practice provide that "the Commission will, so far as practicable, endeavor to fix the same date * * * for hearings on all applications which * * * present conflicting claims * * * excepting, however, applications filed after any such application has been designated for hearing."[11] The excepting clause in this rule

[11] Rule 106.4, quoted by the court below. This rule has been superseded by Section 1.193 of the Commission's Rules of Practice and Procedure, effective August 1, 1939 (4 Federal Register 3345), declaring that the Commission so far as practicable will set conflicting applications for hearing on the same day.

of procedure seems to have been read by the court below as giving an absolute right of priority of consideration to applicants whose applications have been set for hearing before other applications are filed. But the rule, as the Commission urged in the court below and has consistently interpreted it,[12] merely provides, in the interests of avoiding undue delay, that a newly filed application will not ordinarily be set for hearing on the same date as those already set for hearing,[13] and has no bearing upon the order in which applications will finally be acted upon by the Commission. Had the Commission, when it first considered respondent's application on the record originally made, determined that the application might be granted and was not fatally defective, it might have held up final action on respondent's application until the applications of Schuylkill Broadcasting Company and Pottsville News and Radio Corporation were also ready for final action. Such a sensible procedure would have been wholly consistent with the Commission's Rule 106.4, and not in violation of any provisions of statute, rule, or regulation. *J. T. Ward* v. *Federal Communications Commission,* not yet reported,

[12] It is, of course, settled that administrative agencies have the inherent power to interpret their own rules, *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 295, and that their interpretation should be controlling unless beyond the bounds of reason. *American Telephone & Telegraph Company* v. *United States*, 299 U. S. 232.

[13] Examination of an application is a process sometimes requiring several months for completion and it would be undesirable to postpone for so long hearings which had already been set, and as to which the examination had already been completed.

decided by the Court below on November 13, 1939; cf. *Colonial Broadcasters* v. *Federal Communications Commission*, 105 F.(2d) 781 (App. D. C.).

After the court below entered judgment reversing the Commission's denial of respondent's application and remanded the case to the Commission for further consideration, neither Rule 106.4, nor any other rule of the Commission, nor any provision of the statute, entitled respondent to a prior noncomparative consideration of its application. The Court intimated in its opinion that unless such priority was afforded respondent it would, after its successful appeal under Section 402 (b) "be put in any worse position than it occupied on the original hearing" (R. 29). It is clear, however, that respondent, before its application was denied, was not in a position to demand that its application be acted upon finally before consideration was given to the other competing applications. Nothing in the Court's judgment gave the respondent a greater right.

III

THE COURT BELOW, EVEN IF IT WERE AUTHORIZED TO CONTROL THE PROCEDURE OF THE COMMISSION, WAS NOT AUTHORIZED TO ISSUE THE WRIT OF MANDAMUS

We have shown a basic lack of authority in the court below to control the proceedings by which the Commission exercises the administrative duty of granting applications for construction permits or licenses. In this connection we shall point out the rather less fundamental considerations which show the court below had, in any event, neither power nor occasion to issue a writ of mandamus.

A. The Court Below Has No Jurisdiction To Issue Mandamus to the Commission

It must, at the outset, be pointed out that the court below is without jurisdiction to issue a writ of mandamus to the Commission.

The District Court for the District of Columbia, prior to the effective date of Rule 81 (b) of the Federal Rules of Civil Procedure, had power to issue writs of mandamus because it was the highest court of original jurisdiction in the District of Columbia, and on February 27, 1801, the Maryland courts of that nature had such a power. *Kendall* v. *United States,* 12 Pet. 524, 618–626. But, apart from statutory provision, no other court in the District has power to issue the writ, because not until after February 27, 1801, did other courts of Maryland have such a power. *Kendall* v. *United States, supra,* 621. Specifically, the Court of Appeals, which has no general "original common law jurisdiction" (*Sullivan* v. *District of Columbia,* 19 App. D. C. 210, 214; *Universal Motor Truck Co.* v. *Universal Motor Co.,* 41 App. D. C. 261, 262), cannot issue the prerogative writ without statutory authorization.

The only statutory provision which can be argued to authorize issuance of a writ of mandamus to the Commission is Section 33, of Title 18 of the District of Columbia Code, giving the court below "power to issue all necessary and proper writs in aid of its appellate jurisdiction." But, as we have shown (*supra,* pp. 41–42), the jurisdiction over the Commission given the court below by Section 402 of the Communications Act is original, not appellate. Section 33, therefore, does

not afford a basis for issuance of the writ. And, since the original jurisdiction is statutory and limited, rather than common law and general, it is insufficient to permit invocation of the common-law powers of mandamus which attached to the District Court.[14]

B. The Petition for a Writ of Mandamus Was Premature and Administrative Remedies Had Not Been Exhausted

Even if the court below had jurisdiction to issue a writ of mandamus to the Commission, exercise of that jurisdiction is forbidden by almost equally basic limitations: the necessity that the injury be matured and the necessity that administrative remedies be exhausted before relief is sought from the courts. These restrictions against hasty recourse to the courts may some times express different principles, *Pacific Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304, but here they coalesce and are simply alternative phrasings of the prohibition against issuance of the writ of mandamus by the court below before respondent can know that it will be aggrieved by the administrative process.

The injury of which respondent complains at this stage is merely that its application was set for joint hearing on a comparative basis. None can say whether the Commission will grant the application of respondent or of another. Certainly until there has been a refusal by the Commission, respondent cannot com-

[14] The jurisdiction given the court below by Section 402 (b) might be said to be original under Article III, yet appellate under Title 18, section 33 of the District Code. This seems, however, to be an unduly artful reading of well-understood terms.

plain that its application will not be granted. It has, however, obtained the extraordinary relief of a prerogative writ simply (1) because it fears its application may be denied, or (2) because it does not wish the inconvenience of another hearing. It is perfectly clear that neither complaint is sufficient to invoke judicial relief of any nature.

Litigants on numerous occasions have attempted to attack the administration of licensing statutes before they make sure that the administrative action will be adverse. It is settled that no one who "has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration." *Smith* v. *Cahoon,* 283 U. S. 553, 562. See, also, *Gundling* v. *Chicago,* 177 U. S. 183, 186; *Lehon* v. *City of Atlanta,* 242 U. S. 53, 55–56; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 553–554; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 616–617. Respondent falls well within this rule. It has, true, made an application. But it sought and obtained a writ of mandamus to control the procedure by which the administrative process was to be completed. Until the Commission has finally acted, there can be no certainty that respondent will have an injury of which it can complain. Such was the ruling in *McChord* v. *Louisville & Nashville R. Co.,* 183 U. S. 483, 502, and *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 228, where the administrative process of rate regulation had been commenced but not completed.

It is, of course, certain that respondent will have its application considered on a comparative basis with the

other two applications, rather than on its original record alone. But the inconvenience, distaste, or expense of participation in an administrative hearing offers no ground for seeking escape by recourse to the courts. This rule applies to actions at law, *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 343; *First National Bank* v. *Board of County Commissioners,* 264 U. S. 450, 455; as well as in equity, *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300, 304; *Peterson Baking Co.* v. *Bryan,* 290 U. S. 570, 575; *White* v. *Johnson,* 282 U. S. 367, 374; *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 385; *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U. S. 209, 220, 221; cf. *California* v. *Latimer,* 305 U. S. 255, 260.

The relief sought by respondent, and granted by the court below, seems therefore clearly to be "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50–51. The many cases there collected are weighty evidence of the uniformity with which this Court has recognized that it "is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." (*United States* v. *Sing Tuck,* 194 U. S. 161, 168.) The court below granted a writ of mandamus at the instance of one who does not know whether the Commission action will injure him in any way and who simply prefers to have his application given a favored status and heard on its original record.

We think it plain that this relief has not contributed to the orderly disposition of the three conflicting applications for broadcast stations in Pottsville.

C. The Commission Was Not Under a Ministerial Duty and Respondent Had No Clear Right

We have shown that the Act commits to the Commission alone the control of its procedure and the duty of granting or refusing applications for construction permits and station licenses (*supra,* pp. 28–32). We have shown that the Act requires the Commission to grant, among the three conflicting applications for a Pottsville broadcast station, that which will best serve the public interest, convenience, or necessity (*supra,* p. 14). We have shown that a sensible way to consider the three applications is in a single hearing on a comparative basis (*supra,* pp. 15–16). Respondent will doubtless oppose these conclusions, which to us seem almost self-evident. But it seems wholly impossible that this Court could conclude that the Commission was so plainly in error that it could be said to be under a "ministerial duty" to consider respondent's application on its original record and without regard to the conflicting applications then pending, or that respondent could be said to have a "clear right" to compel the procedure which the court below has decreed for the Commission.

Yet there will be no dispute but that where "the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving

the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie,* 281 U. S. 206, 219. See, also, *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543; *United States ex rel.* v. *Interstate Commerce Commission,* 294 U. S. 50, 61; *United States* v. *Wilbur,* 283 U. S. 414, 420; *Work* v. *Rives,* 267 U. S. 175, 183–184; *Interstate Commerce Commission* v. *Waste Merchants Assn.,* 260 U. S. 32, 35; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Redfield* v. *Windom,* 137 U. S. 636, 644. It seems necessarily to follow that the court below, in issuing its writ of mandamus, seriously breached this time-honored restriction upon the use of that extraordinary prerogative writ.

D. Equitable Principles Forbid Issuance of the Writ of Mandamus in This Case

A writ of mandamus is an extraordinary legal remedy. But its issuance is controlled by equitable principles. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 312; *Arant* v. *Lane,* 249 U. S. 367, 371; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 96; *United States* v. *Dern,* 289 U. S. 352, 359; *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543–544. Any one of three recognized limitations upon the grant of equitable relief precludes issuance of the writ of mandamus in this case.

1. *There is no Irreparable Injury.*—We have already shown (*supra,* pp. 51–52) that respondent can point to *no* injury which is certain to result from the Commission's order setting the three applications for oral

argument. Much less can it point to any irreparable injury. The petition for a writ of mandamus should therefore have been denied.

2. *There is an Adequate Remedy by Appeal.*—Section 402 (b) (1) of the Act gives the respondent the plain and perfectly adequate remedy of appeal to the court below from a denial by the Commission of its application for a construction permit. Yet the court below issued the writ notwithstanding the settled rule that mandamus will not lie where another adequate remedy is available. *United States ex rel. Crawford* v. *Addison,* 22 How. 174; *In re Morrison,* 147 U. S. 14, 26; *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 544; *Sykes* v. *Jenny Wren Co.,* 78 F. (2d) 729 (App. D. C.)

3. *The Equity of the Statute.*—Since issuance of a writ of mandamus is controlled by equitable principles, the court below should not have granted that extraordinary relief except it would have satisfied the conscience of the chancellor as well as the demands of the respondent. But "it is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States* v. *Morgan,* 307 U. S. 183, 194. When the case involves an administrative agency created to enforce an Act of Congress, the statute is a definitive standard of the public interest which must shape the judicial as well as the administrative action. *United States* v. *Morgan, supra,* 191.

Here there seems plainly to be a conflict between the relief granted by the court below and the requirement of Section 319 (a) that the Commission grant the application only if it would serve the public convenience, interest, or necessity. We have shown (*supra*, pp. 12–20) that the ultimate effect of the decision below will not be to deprive Schuylkill or Pottsville Radio and News of a permit and license if the Commission should find one of them to be qualified and to offer better radio service. But, under the writ of mandamus, respondent's application would have to be granted, if it is otherwise qualified, without regard to the subsequent refusal to grant a station license to respondent which would be necessary if one of the others were found to be a preferable applicant. This flies in the teeth of Section 319 (a), the command of which is not to be ignored because any harm may later be undone, and is in sharp contradiction to any sensible pattern of procedure. If ever there be an occasion for a court guided by equitable principles to intermeddle with the administrative process, it should be to enforce and not to contradict the policy of the statute. Since the relief granted by the court below cannot be squared with either the terms or the policy of the statute, its action was in striking disregard of the equitable standards which should control issuance of a writ of mandamus.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision and judgment of the court below

should be reversed with instructions to dismiss respondent's petition for a writ of mandamus.

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DECEMBER 1939.

APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937 (47 U. S. C. Supp. IV, Secs. 151 *et seq.*):

SEC. 4 * * *

* * * * *

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of

Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting

licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * * *

SEC. 312. * * *

* * * * *

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given

reasonable opportunity to show cause why such an order of modification should not issue.

* * * * *

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for con-

struction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio sta-

tion license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested per-

sons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the Court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues

involved upon said appeal and the outcome thereof.

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Radio Act of 1927, c. 169, 44 Stat. 1162:

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the Commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and

character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

The last paragraph of Section 16 of the Radio Act of 1927 was amended, c. 788, 46 Stat. 844, to read as follows:

> At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

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